

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

-against- :

RICARDO MARMOLEJOS, :
a/k/a "Rudy Feliz," :

Defendant. :
-----X

AFFIRMATION

08 Cr. 681 (KMK)

PAUL E. DAVISON, ESQ., affirms as follows, under penalty of perjury pursuant to
28 U. S. C. § 1746:

1. I am an attorney with Federal Defenders of New York, Inc., court-appointed counsel for the defendant in the captioned case. I make this affirmation in support of defendant's pretrial motions to suppress eyewitness identification testimony and to compel disclosure of evidence related to such identification testimony.

2. This case involves allegations that the defendant, using the false name "Rudy Feliz", visited the Costco warehouse store in Yonkers, New York, on February 7, 2008, established a membership account, and then attempted to purchase \$5,014.81 worth of merchandise with a counterfeit credit card.

3. The membership application process required store personnel to photograph the applicant in order to generate a membership card bearing the member's likeness. A copy of the portion of the "Rudy Feliz" membership card which contains the "Rudy Feliz" photograph is attached as Exhibit A. The photograph appears to depict a clean-shaven individual. Based upon counsel's review of this xerox copy of the membership card photograph, the individual depicted

on the “Rudy Feliz” membership card does not resemble the defendant, Ricardo Marmolejos.

4. The individual who posed as “Rudy Feliz” on February 7, 2008, was captured on video by security officials at the Costco store, and copies of the videos has been provided to the defense. Based on counsel’s review of the video footage, the individual who posed as “Rudy Feliz” was clean shaven and does not resemble the defendant, Ricardo Marmolejos.¹

4. According to the complaint on file in this matter, the police developed Mr. Marmolejos as a suspect in this investigation because they discovered that a second individual who participated in the fraud, and who was arrested on February 7, 2008, called Mr. Marmolejos from his cell phone shortly after the crime. (Marmolejos was not arrested until on or about June 25, 2008.)

4. According to the complaint, law enforcement officers showed a photo array containing a photograph of Mr. Marmolejos to witnesses at Costco on or about June 19, 2008. Counsel has been advised that two witnesses selected Mr. Marmolejos from the photo array, and that no witness failed to make an identification. A copy of the photo array is attached as Exhibit B.

5. Examination of the photo array reveals that a photograph of the defendant Ricardo Marmolejos appears at position 1 of the six-photo array. In the array photograph, Mr. Marmolejos is clean-shaven, apart from a small triangular tuft of facial hair immediately beneath his lower lip.² The other five men whose photographs comprise the array all have moustaches and goatees. Among the six males depicted in the array, Mr. Marmolejos is the only man whose

¹The defense is attempting to capture from the video footage “still” images depicting the individual who posed as “Rudy Feliz.” The defense will supplement this affirmation as appropriate if that can be accomplished.

²This tiny configuration of facial hair is known colloquially as a “soul patch.”

upper lip and chin are clean shaven.

6. By letter dated July 23, 2008, the defense requested from the Government additional information concerning the out-of-court identification procedures at issue. In particular, the defense requested the following information as to each out-of-court identification:

- 1) the circumstances under which the witness observed the individual posing as “Rudy Feliz” (i.e., Loss Prevention Officer who observed him via video surveillance, cashier who processed the credit card transaction, etc.);
- 2) any description provided by the witness of the individual posing as “Rudy Feliz”;
- 3) whether the witness viewed any photograph (i.e. membership card photo, driver’s license photo, surveillance video, etc.) of “Rudy Feliz” at any time prior to viewing the photo array;
- 4) the date and circumstances of the out-of-court identification; and
- 5) the level of certainty expressed by the witness in making the identification.

A copy of counsel’s July 23, 2008 discovery request is attached as Exhibit C.

7. The Government responded to counsel’s discovery request by letter dated July 29, 2008. With respect to the inquiries set forth above, the Government responded that these requests “are not discovery as defined in Rule 16, and the Government declines to produce any such material.”³ A copy of the Government’s July 29, 2008 letter is attached as Exhibit D.

I declare under penalty of perjury that the foregoing is truthful and correct.

³The Government has supplemented this formal response by informally advising counsel that: 1) the witnesses who made identifications were a Costco Loss Prevention Officer and a Costco Assistant Manager; and 2) that both identifications were made on or about June 19, 2008.

Dated: August 4, 2008
White Plains, NY

PAUL E. DAVISON, ESQ.

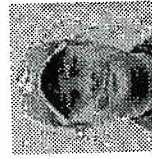
Exhibit

A

FOR HOURS & LOCATIONS, VISIT WWW.COSTCO.COM

H

Mr# 111781861035
RUDY FELIZ



W00321
02/2008

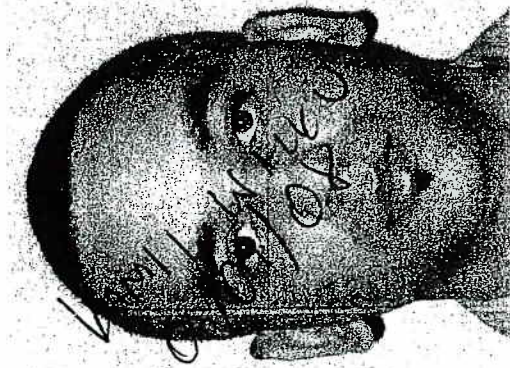


Exhibit

B



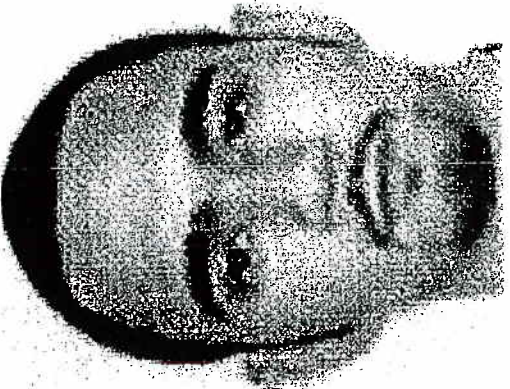
NY/NJ HIDTA
PHOTOGRAPHIC LINE-UP ADMONITION



1



2



3



4



5



6

Exhibit

C

**Federal Defenders
OF NEW YORK, INC.**

Southern District
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Leonard F. Joy
Executive Director and
Attorney-in-Chief

Paul E. Davison
Attorney-in-Charge
White Plains

U.S. ATTORNEY
FOR THE S.D.N.Y.
JUL 23 2008
RECEIVED
WHITE PLAINS OFFICE
LDR

July 23, 2008

Anna M. Skotko, Esq.
Assistant United States Attorney
Southern District of New York
300 Quarropas Street
White Plains, New York 10601

**Re: United States v. Ricardo Marmolejos
08 Cr. 681 (KMK)**

Dear Ms. Skotko:

Thank you for your discovery-related letter dated July 18, 2008, and its enclosures.

The discovery package included four (4) photo arrays which appear to document identifications of a photograph of Mr. Marmolejos by four witnesses. These items are collectively described in the letter as "[c]opies of the photo arrays shown to witnesses at the Costco in Yonkers[.]"

I request that the Government provide the following information with respect to each out-of-court identification:

- 1) the circumstances under which the witness observed the individual posing as "Rudy Feliz" (i.e., Loss Prevention Officer who observed him via video surveillance, cashier who processed the credit card transaction, etc.);
- 2) any description provided by the witness of the individual posing as "Rudy Feliz";
- 3) whether the witness viewed any photograph (i.e. membership card photo, driver's license photo, surveillance video, etc.) of "Rudy Feliz" at any time prior to viewing the photo array;
- 4) the date and circumstances of the out-of-court identification; and
- 5) the level of certainty expressed by the witness in making the identification.

Anna M. Skotko, Esq.
Assistant United States Attorney
Southern District of New York

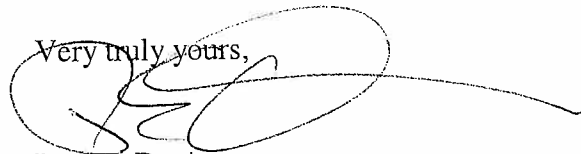
July 23, 2008
Page 2

Re: United States v. Ricardo Marmolejos
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In addition, please advise the defense whether any witness viewed the photo array and failed to make an identification.

Thank you for your assistance.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Paul E. Davison', written over the closing 'Very truly yours,'.

Paul E. Davison
(914) 428-7126

Exhibit

D



*United States Attorney
Southern District of New York*

*United States District Courthouse
300 Quarropas Street
White Plains, New York 10601*

July 29, 2008

BY HAND

Paul Davison, Esq.
Federal Defenders of New York
300 Quarropas Street
White Plains, New York 10601

Re: United States v. Ricardo Marmolejos, a/k/a "Rudy Feliz," 08 Cr. 681 (KMK)

Dear Mr. Davison:

This letter provides additional discovery in response to your letter request dated July 23, 2008, and pursuant to Rule 16(a) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P.").

The Government's original discovery package, dated July 18, 2008, included four photocopies of two photo arrays documenting identifications by two witnesses.¹ Your letter requested the following information with respect to the out-of-court identifications: (1) the circumstances under which the witness observed the defendant; (2) any description of the defendant provided by the witness; (3) whether the witness viewed any photograph of the defendant prior to viewing the photo array; (4) the date and circumstance of the out-of-court identification; (5) the level of certainty expressed by the witness in making the identification; and (6) whether any witness viewed the photo array and failed to make an identification.

In response to your last inquiry, no witness viewed the photo array and failed to make an identification. The remainder of your requests are not discovery as defined in Rule 16, and the Government declines to produce any such material.


The Government has recently learned that the defendant also made an oral statement after he was arrested on June 25, 2008. The defendant stated, in part and in substance, that he had recently been contacted by the Perpetrator referenced in the Complaint, who was at that time in federal custody.

¹ As a matter of clarification, two photocopies of each array were provided in light and dark contrast to most clearly show both the photograph images and the witnesses' markings.

Please contact me at your earliest convenience concerning the possible disposition of this matter or any further discovery which you may request.

Very truly yours,

MICHAEL J. GARCIA
United States Attorney

By: 

Anna M. Skotko
Assistant United States Attorney
(914) 993-1939